FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 8 1958
JAMES R. BROWNING, Clerk

No. 499

In the Supreme Court of the United States

OCTOBER TERM, 1958

CONSTANTIN KOTSAMPAS AND PETROS PHASSINOS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
PAUL J. KOMIVES,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Cases:	
Berg v. *United States*, 176 F. 2d 122, certiorari denied 338 U. S. 876	10
Bilokumsky, United States ex rel. v. *Tod*, 263 U. S. 149	11
Ledbetter v. *United States*, 170 U. S. 606	10
Snow, In re, 120 U. S. 274	9
United States v. *Cores*, 356 U. S. 405	8, 9
Statutes and rule:	
Immigration and Nationality Act of 1952, § 252 (66 Stat. 220, 8 U. S. C. 1282)	2, 4, 8
18 U. S. C. 3237	3, 8
Rule 7 (e), F. R. Crim. P	9

489934—58

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 499

CONSTANTIN KOTSAMPAS AND PETROS PRASSINOS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 9) is reported at 257 F. 2d 64.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1958. A petition for rehearing was denied on September 9, 1958. On October 9, 1958, Mr. Justice Burton extended the time for filing a petition for a writ of certiorari to November 8, 1958. The petition for a writ of certiorari was filed November 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Where venue may be based upon the defendant's presence within the district at any time during the continuation of the offense, whether a variance between the date of such presence alleged in the information and the date admitted at the trial was prejudicial.

2. Whether the district court was required to provide an interpreter for the defendant during the reading into evidence of a statement previously made by him, where the statement was available to the defendant and his counsel prior to trial.

3. Whether, in a criminal trial on an information charging an alien crewman with having illegally remained in the United States after expiration of his landing permit, a voluntary statement previously made by him in the course of an investigation into his status by officers of the Immigration and Naturalization Service, before the criminal charges were filed and after he was cautioned that any statement could be used against him, was inadmissible because he had not been told that he was entitled to the assistance of counsel.

STATUTES INVOLVED

Section 252 of the Immigration and Nationality Act of 1952 (66 Stat. 220, 8 U. S. C. 1282) provides in part:

> (a) No alien crewman shall be permitted to land temporarily in the United States except as provided in this section, section 212 (d) (3), section 212 (d) (5), and section 253. If an immigration officer finds upon examination that

an alien crewman is a nonimmigrant under paragraph (15) (D) of section 101 (a) and is otherwise admissible and has agreed to accept such permit, he may, in his discretion, grant the crewman a conditional permit to land temporarily pursuant to regulations prescribed by the Attorney General, subject to revocation in subsequent proceedings as provided in subsection (b), and for a period of time, in any event, not to exceed—

(1) the period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port, if the immigration officer is satisfied that the crewman intends to depart on the vessel or aircraft on which he arrived; or

(2) twenty-nine days, if the immigration officer is satisfied that the crewman intends to depart, within the period for which he is permitted to land, on a vessel or aircraft other than the one on which he arrived.

* * * * *

(c) Any alien crewman who wilfully remains in the United States in excess of the number of days allowed in any conditional permit issued under subsection (a) shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500 or shall be imprisoned for not more than six months, or both.

18 U. S. C. 3237 provides in part:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted

in any district in which such offense was begun, continued, or completed.

* * * * *

STATEMENT

In separate trials without a jury petitioners, both alien crewmen, were found guilty of willfully remaining in the United States in excess of the number of days allowed in their landing permits, in violation of § 252 (c) of the Immigration and Nationality Act of 1952, *supra*, p. 3, and sentenced to six-months imprisonment. (KR. 24; PR. 62).[1] On consolidated appeals, the court of appeals affirmed. The facts of the two cases, again consolidated here, are as follows:

PETITIONER KOTSAMPAS

1. On September 4, 1957,[2] an information was filed in the United States District Court for the Southern District of Ohio charging (Pet. 10):

> That on or about December 30, 1956, within the Eastern Division of the Southern District of Ohio, CONSTANTIN KOTSAMPAS did willfully remain in the United States in excess of the period allowed in a Crewman's Landing Permit (form I-95A) issued to said defendant on November 30, 1956.

---

[1] The trials were held consecutively, both petitioners being represented by the same counsel. "KR." refers to the transcript of the trial of petitioner Kotsampas; "PR.", to that of petitioner Prassinos.

[2] See photostat of docket in the record filed with this Court. Petitioner's assertion that the information was filed on May 28, 1957 (Pet. 2), confuses the filing of the information with the date on which petitioner was apprehended by the Immigration officers.

The facts developed at the trial were as follows: Petitioner Kotsampas arrived at Baltimore, Maryland, on November 30, 1956, as a crewman aboard the *S. S. Linda* (KR. 7). He was given a "Crewman's Landing Permit" requiring him to leave the United States on or before December 14, 1956 (KR. 13, 18). He went immediately to New York City, where he remained until December 15. He then went to Gary, Indiana, and remained there through March 1957 (KR. 21–22). On April 1, 1957, he went to Yorkville, Ohio (in the Southern District), and remained there until he was apprehended, on May 28, 1957, by officers of the Immigration and Naturalization Service and taken into custody for investigation of his status (KR. 5, 22). He was later placed under arrest for the crime charged in the information (KR. 10).

2. When apprehended by the Immigration officers, petitioner Kotsampas was asked to submit to questioning under oath "concerning your status under the Immigration laws" and was told that "Any statements which you make must be voluntary and may be used by the Government as evidence in any deportation or criminal proceeding" (KR. 6). The statement thereafter made by petitioner was introduced into evidence at the trial (KR. 6–11). The statement dealt primarily with petitioner's past unsuccessful attempts to obtain an immigration visa (KR. 8–11), and the only part relevant to this case was the statement that he had entered the United States at Baltimore on November 30, 1956, under a crewman's landing permit (KR. 7).

The landing permit issued to petitioner, showing his arrival and the period he was permitted to remain, was introduced into evidence (KR. 5). Immigration officer Benson testified that he apprehended petitioner in Yorkville on May 28, 1957 (KR. 5). Petitioner took the stand and testified in detail as to his activities and whereabouts after his entry (KR. 17–23).

PETITIONER PRASSINOS

1. On September 5, 1957,[3] an information was filed in the United States District Court for the Southern District of Ohio charging (Pet. 10):

> That on or about October 21, 1956, within the Eastern Division of the Southern District of Ohio, Petros Prassinos, also known as PETROS PRASINOS did wilfully remain in the United States in excess of the period allowed in a Crewman's Landing Permit (Form I–95A) issued to said defendant on September 21, 1956.

The facts developed at the trial were as follows: Petitioner Prassinos arrived at Boston, Massachusetts, on September 21, 1956, as a crewman aboard the *S. S. Gannitt* (PR. 18, 31, 42). He was issued a "Crewman's Landing Permit" requiring him to leave the United States on or before October 20, 1956 (Pr. 31). He was immediately hospitalized upon his arrival, and, upon his release from the hospital on October 5, 1956, his permit was amended to require his departure on the *S. S. New York* on October 6, 1956 (PR. 19–20, 31–33, 42–43). On October 6, petitioner went to New York City and then, on about October

[3] See note 2, *supra*.

7, to Wheeling, West Virginia (PR. 22, 23, 48, 52). A few days later, he went to Martin's Ferry, Ohio (in the Southern District), to visit a relative for several days and then returned to Wheeling (PR. 23–24, 49, 53). On about April 1, 1957, petitioner returned to Martin's Ferry and resided there until he was apprehended, on May 10, 1957, by Immigration officers and taken into custody for investigation of his status (PR. 5–6, 15, 24). On June 26, 1957, he was placed under arrest for the crime charged in the information (PR. 14).

2. When apprehended by the Immigration officers, petitioner Prassinos was asked to submit to questioning under oath "concerning your right to remain in the United States and concerning any matter either criminal or civil involving the Immigration" laws and was told that any statement "should be voluntary and will be used in any proceedings the Government deems necessary" (PR. 11). The statement thereafter made by petitioner Prassinos was introduced into evidence at the trial (PR. 7, 11, 15–27, 28). So far as is relevant here, the statement related petitioner's entry, his receipt of a landing permit, and his whereabouts until his apprehension. The statement, which had been taken in English with the aid of an interpreter, was read to the court by the Immigration officer who had taken it. Part way through the reading, petitioner's counsel observed that petitioner spoke only Greek and requested an interpreter (PR. 17). The request was denied, and no exception was taken (PR. 17).

The landing permit issued to petitioner was introduced into evidence (PR. 6–7), and Immigration officer Hanscom testified that he apprehended petitioner in Clarington, Ohio (near Martin's Ferry), on May 10, 1957 (PR. 5–6). Petitioner took the stand and testified in detail as to his activities and whereabouts after his entry (PR. 41–54).

ARGUMENT

1. Petitioners contend that they were not in Ohio on the dates charged in the informations and hence venue, which must be laid in the district where the alleged crime occurred, was improper. It was held in *United States* v. *Cores*, 356 U. S. 405, however, that the crime of overstaying a landing permit was a single continuing offense which commenced at the moment the permit expired and continued throughout the alien's unlawful presence in the United States and, accordingly, that it could be tried in any district in which the offense "continued" (18 U. S. C. 3237, *supra*, pp. 3–4). So here, the petitioners were charged not with a crime "occurring" and completed on the dates charged, when they were not in the district, but with a crime commencing on those dates[4] and continuing through the subsequent periods when they admittedly were in the district. Since the crimes

[4] In each case, the date alleged was the 30th day following the defendant's entry, which would have been the date of the commencement of the offense if, as seems to have been assumed, the permits were for the maximum of 29 days allowed by the statute (§ 252 (a)). In fact, both permits, as finally amended, were for less than the maximum of 29 days, so the crimes actually commenced some days earlier than alleged, but that minor variance seems of no significance.

were "continued" in the Southern District of Ohio, it is clear, under *Cores*, that petitioners could be tried there for the crimes alleged in the informations.

Since the venue was fully established by the evidence, the most that petitioners can contend is that there was a variance between the informations and the proof as to the dates of the events on which venue was based (*i. e.*, presence in Ohio). Even assuming that the dates of the events establishing venue must be alleged, however, the variance here was immaterial. Petitioners suggest no possible prejudice resulting from the variance,[5] and it is clear from the record that they were in no way misled in preparing their defense by the allegations of the informations. The defect, if any, therefore, was purely formal, and the failure to amend the venue allegations to conform to the proof[6] was not prejudicial error. See *Led-*

[5] Petitioners' contention that the informations, by alleging dates earlier than their apprehension, leave them open to further prosecutions for "remaining" elsewhere on later dates, is frivolous. The crime of overstaying shore leave, although it might "continue" in several districts, is a single offense prosecution for which in any district bars prosecution in any other. See *Cores, supra; In re Snow*, 120 U. S. 274, 281.

[6] Under Rule 7 (e), F. R. Crim. P., the court may permit "an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." At the trials here, petitioners' primary argument was that the informations alleged separate and distinct crimes occurring only on the dates alleged and that the proof of later presence in Ohio established either no crimes occurring there (under the argument later rejected in *Cores*) or at least different and separate crimes from those alleged in the informations. These objections, which were properly rejected on the ground that the informations alleged single continuing crimes, went to the

Ketter v. *United States*, 170 U. S. 606, 612; *Berg* v. *United States*, 176 F. 2d 122, 126 (C. A. 9), certiorari denied, 338 U. S. 876.

2. It is contended on behalf of petitioner Prassinos that the court's refusal to grant a request for an interpreter during the last part of the reading of his statement was a violation of the Sixth Amendment right of confrontation. Not only was the constitutional issue not raised at the trial but no exception at all was taken from the court's denial of the request. It is clear, moreover, that there was no prejudice. The statement was available to petitioner and his counsel before trial and there was no suggestion, then or now, that it was an incorrect version of petitioner's interrogation. No other material evidence was introduced by the Government after the request was made, and petitioner expressly waived any objection to the lack of an interpreter up to that time (PR. 17). The petitioner later testified in his own behalf and his testimony corroborated all the facts in the statement. Finally, there is no showing that petitioner could not have provided an interpreter for himself if he or his counsel deemed it advisable.[7]

---

substantive nature of the crimes charged and not to the mere variance between pleadings and proof as to venue, and it is undoubtedly for that reason that no amendment to eliminate the formal variance was sought.

[7] No request for an interpreter was made in petitioner Kotsampas' trial—again demonstrating that counsel did not consider the matter important—but in any event it is clear, for the same reasons as in Prassinos' case, that no substantial rights were affected by the lack of an interpreter.

3. Petitioners contend finally that their statements were inadmissible because they were not told, when the statements were taken, that they were entitled to counsel. The short answer is that there is no right to counsel during examination in the course of immigration investigations. *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149. Each of the statements was taken in the course of an investigation to determine the alien's status undertaken well before he was charged with any crime. Petitioners were simply given an opportunity to show why they should not be deported. Their statements were primarily exculpatory in purpose and added nothing of substance to their testimony at the trials.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL J. KOMIVES,
Attorneys.

DECEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958